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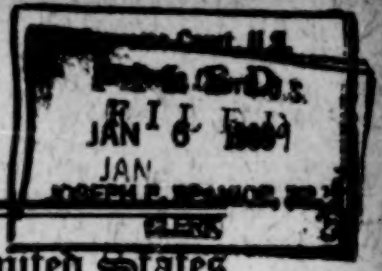
No. 88-873



In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL R. SHROEDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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10 pp

QUESTIONS PRESENTED

1. Whether Article 52(a)(2) of the Uniform Code of Military Justice, 10 U.S.C. 852(a)(2), permits a defendant to be convicted by the concurrence of two-thirds of the members of a court-martial panel for an offense with a mandatory minimum sentence of life imprisonment.

2. Whether the trial judge committed plain error in instructing the court-martial panel that life imprisonment was a mandatory punishment for murder.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 11a-20a) is reported at 27 M.J. 87. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 1a-10a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 29, 1988. The petition for a writ of certiorari was filed on November 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. IV) 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, was convicted by a general court-martial of two

specifications of robbery and two specifications of murder while perpetrating a robbery, in violation of Articles 118 and 122 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918 and 922. Petitioner was sentenced to confinement for life, forfeiture of $300 pay per month for 36 months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the findings and sentence, but reduced the term of imprisonment to 25 years. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. The United States Court of Military Appeals affirmed.

1. The charges against petitioner arose from the robbery and murder of Marine Lance Corporal Raymond Hiquiana and his wife Mabel in Kitanakagusuku, Okinawa. The facts are summarized in the opinion of the court of military review. Pet. App. 2a-4a.

The evidence at petitioner's trial showed that two other Marines, Alan Clark and Rocky Reliford, decided to rob and murder the reputedly wealthy Hiquianas. Petitioner asked to go along, and he served as the driver for the other two. Petitioner and his confederates purchased three pair of rubber gloves, staked out the Hiquianas' apartment, and followed Raymond Hiquiana as he drove to pick up his wife at work. The conspirators then quickly returned to the Hiquianas' apartment and waited outside for the Hiquianas to return. Clark and Reliford persuaded the Hiquianas to let them into the apartment, while petitioner stayed with the car to assist in the getaway. Reliford and Clark later returned to the car, covered with blood and carrying stolen stereo and video equipment. As petitioner drove the three to Reliford's apartment, Clark and Reliford described how they had killed the Hiquianas by slitting their throats with utility knives. Reliford later used Raymond Hiquiana's identification to withdraw the Hiquiana's savings from

their local bank accounts. Petitioner accepted and helped to dispose of some of the stolen property.[1]

2. A court-martial is a bifurcated proceeding with separate guilt and sentencing stages, and the members of the court-martial panel must separately decide each question. When capital punishment is the mandatory penalty for a charged crime, the panel members must be unanimous in order to convict a servicemember of that offense. Art. 52(a)(1), UCMJ, 10 U.S.C. 852(a)(1). For any other offense, a servicemember may be convicted by a two-thirds vote of the panel. Art. 52(a)(2), UCMJ, 10 U.S.C. 852(a)(2). The sentencing stage then commences. After hearing evidence in aggravation and mitigation, the panel votes on an appropriate sentence. In order to impose a capital sentence, the panel must be unanimous. Art. 52(b)(1), UCMJ, 10 U.S.C. 852(b)(1). To impose a sentence of life imprisonment or a term of confinement for more than ten years, three-fourths of the panel members must agree. Art. 52(b)(2), UCMJ, 10 U.S.C. 852(b)(2). Any other sentence may be imposed by a two-thirds vote of the panel. Art. 52(b)(3), UCMJ, 10 U.S.C. 852(b)(3).

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[1] Petitioner subsequently confessed to his role in the murders (GX 15). Petitioner's confession was corroborated by several other items of evidence. For example, Reliford gave his girlfriend a gold bracelet that had belonged to Mabel Hiquiana (Tr. 180-183). A friend of petitioner's testified that he helped petitioner dispose of the stolen videotapes, and that he watched petitioner clean the inside of his car and throw away a pair of rubber gloves (Tr. 192-199). An Okinawan mechanic testified that he helped Reliford hide the stolen video equipment and later helped petitioner dispose of it (Tr. 209-210). Petitioner also made admissions to a friend that were consistent with his confession (Tr. 196-198).

In this case, the court-martial members were instructed at the guilt stage of trial, without defense objection, that a two-thirds majority vote was required to convict petitioner of each of the charged offenses. Tr. 427. The panel found petitioner guilty of two specifications of robbery and two specifications of felony murder. Tr. 445-446. During the sentencing phase of the trial, again without objection by the defense, the panel members were instructed that life imprisonment was mandated, although all other aspects of the sentence, such as the type of discharge (if any) that petitioner should receive and the amount of pay (if any) that he should forfeit, were open for their consideration. Tr. 472-473. The panel members were also instructed to vote on each proposed sentence in its entirety until they reached the three-quarters concurrence. Tr. 481. The members imposed a sentence that included confinement for life. Tr. 485.

ARGUMENT

1. Petitioner argues (Pet. 6-11) that his murder conviction is invalid because the court-martial panel was instructed that he could be convicted by a two-thirds vote of the panel-members. Although Article 52(a)(2) of the UCMJ, 10 U.S.C. 852(a)(2), provides that a two-thirds majority is sufficient to convict a defendant for any offense except one in which the death penalty is mandatory, petitioner maintains that a separate provision, Article 52(b)(2) of the UCMJ, 10 U.S.C. 852(b)(2), which requires a three-fourths majority to impose a sentence of ten or more years' confinement, should be interpreted to require the concurrence of three-fourths of the members of the court-martial panel to convict the defendant in any case in which he is charged with a crime for which there is a mandatory life sentence. Petitioner's claim does not warrant review by this Court, for several reasons.

Petitioner did not properly preserve his claim because he did not object at trial to the court's instruction that he could be found guilty of the charged offenses if two-thirds of the court-martial panel members concurred in that finding.[2] Accordingly, petitioner has waived his claim by failing to assert it in a timely fashion.

On the merits, petitioner's claim is the same as the question presented in the petition filed by one of petitioner's accomplices. See *Reliford* v. *United States*, petition for cert. pending, No. 88-767. For the reasons given in our brief in opposition in that case,[3] the military courts correctly rejected petitioner's contention, and their decision does not warrant further review.

2. Petitioner also contends (Pet. 12-16) that the trial judge erred by instructing the court-martial panel members that, even though they must vote on the entire sentence, including the question of what type of discharge (if any) petitioner should receive and what amount of pay (if any) he should forfeit, life imprisonment was a mandatory sentence for murder. Petitioner argues that that instruction violated Rules 1006(d)(4)(B) and 1006(d)(5) of the Rules for Courts-Martial, *Manual for Courts-Martial, United States—1984* (*Manual*) II-153 to II-154, which re-

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[2] Article 51(a) of the UCMJ, 10 U.S.C. 851(a), requires that the panel members vote by secret ballot. Even when more than two-thirds of the members vote to convict, that fact is not made public (see Tr. 445). The petition is therefore somewhat misleading when it states (Pet. 7-10) that petitioner was convicted by two-thirds vote. The unopposed instruction to the court-martial panel ensured that there were at least four (of six) votes for conviction (Tr. 440). In fact, there may have been more. Petitioner also did not ask to have the panel members polled on their vote. Thus, only the required two-thirds vote for conviction was announced.

[3] We have supplied counsel for petitioner with a copy of our brief in opposition in *Reliford*.

quire the panel to agree by a three-fourths majority on any sentence of ten or more years' imprisonment.

Petitioner did not object at trial, however, to the instruction that life imprisonment was the mandatory sentence for murder. Tr. 482; Pet. App. 9a n.3. Petitioner has therefore waived his claim that the trial court's instructions were improper. Rule 1005(f), *Manual* II-153. Moreover. as the Court of Military Appeals explained (Pet. App. 14a-15a), Rule 1006(d)(5) of the *Manual* cannot be read in a manner that would negate the mandatory minimum sentence of life imprisonment that is fixed by Article 118 of the Uniform Code of Military Justice for the crime of murder. In fact, both the UCMJ and the *Manual* establish a procedure by which a panel's failure to impose a mandatory sentence can be corrected. See Pet. App. 15a (describing the rehearing procedure). Accordingly, because petitioner was not entitled to the possibility of a sentence of less than life imprisonment for the crime of which he was convicted, the trial judge did not err by informing the panel members that life imprisonment was a mandatory penalty for murder.[4]

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[4] Petitioner suggests that the trial court's instruction had the effect of nullifying the panel's clemency recommendations. Although those recommendations do not effect the sentence imposed by Article 118 for murder, they may have influenced the decision of the convening authority to exercise his clemency power under Article 60(c)(2), 10 U.S.C. 860(c)(2). In fact, the convening authority reduced petitioner's sentence from life imprisonment to 25 years' confinement, which makes petitioner eligible for parole after serving slightly more than eight years' imprisonment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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